BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBORAH S. MULLINS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,041,899
USD 308	)	
Respondent	)	
AND	)	
	)	
TWIN CITY FIRE INSURANCE COMPANY	)	
and HARTFORD INSURANCE COMPANY	)	
OF THE MIDWEST	)	
Insurance Carriers	)	

ORDER

Respondent and its insurance carriers appeal the February 2, 2009, Preliminary Hearing Order of Administrative Law Judge Bruce E. Moore (ALJ). Claimant was originally provided medical benefits after falling on September 2, 2008, as she walked down a hall in respondent's school. Respondent had voluntarily provided medical benefits after the accident, but later filed an application for preliminary hearing, requesting to terminate those benefits. The ALJ, after reviewing the evidence, determined that the fall was "unexplained" and, thus, compensable. Respondent's motion to terminate the medical benefits was denied.

Claimant appeared by her attorney, Matthew L. Bretz of Hutchinson, Kansas. Respondent and its insurance carriers appeared by their attorney, Matthew J. Schaefer of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held January 9, 2009, with attachments; the transcript of the deposition of Joseph Carl Woody taken January 21, 2009, with attachments; the transcript of the deposition of Cindy Diane Colle taken January 21, 2009, with attachments; the transcript of the deposition of Randall Eugene Norwood taken January 21, 2009, with

attachments; the transcript of the deposition of Linda Frances Garcia taken January 21, 2009; and the documents filed of record in this matter.

ISSUE

Did claimant suffer an accidental injury which arose out of and in the course of her employment with respondent?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Hearing Order should be affirmed. The Order of the ALJ sets out findings of fact and conclusions of law in some detail, and it is unnecessary to repeat those herein. The findings and conclusions of the ALJ are adopted by this Board Member, and incorporated into this Order.

Claimant was employed as an art teacher for respondent on September 2, 2008, when she fell shortly after exiting an elevator and while walking a short distance down a hallway. At the time of the accident, claimant was wearing an orthopaedic boot on her left foot, the result of a non-work-related condition. As is noted in the Preliminary Hearing Order of the ALJ, the evidence contradicts at almost every turn. Either the floor was slick or it wasn't; either the boot provided better traction or worse traction than a regular shoe; either claimant slipped or she didn't; either there was dust on the floor, and therefore on claimant's boot, or there wasn't; either the orthopaedic boot caused claimant to fall or it didn't. The answer to every question is either yes or no, depending on which witness is testifying, and when that particular witness was providing evidence. The ultimate determination by the ALJ was that it is not possible, from this record, to determine whether claimant's fall was the result of the orthopaedic boot, which would be a personal risk, or the result of a slick floor, or dust on the floor or boot, which would involve work-related risks.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

[1] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

Respondent does not dispute that claimant's injury occurred in the course of her employment. However, whether the accident occurred out of the employment is in dispute.

> The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[5]

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[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2008 Supp. 44-501(a).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[5] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

The confusion regarding the cause of claimant's slip and fall was accurately described by the ALJ. Confusion associated with unexplained falls at work has been addressed by the Kansas Supreme Court.

In *Hensley*,[6] the Kansas Supreme Court categorized risks associated with work injuries into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character. This analysis is similar to the analysis set forth in 1 *Larson's Worker's Compensation Law*, § 7.04[1][a] (2006). The simplest explanation is that if an employee falls while walking down the sidewalk or across a level factory floor for no discernable reason, the injury would not have happened if the employee had not been engaged upon an employment errand at the time.

Here, the fall suffered by claimant has not been explained in this record. Claimant was walking in respondent's hall when she fell and suffered an injury. The reason for that fall cannot be discerned from this record. Therefore, it falls under the heading of an unexplained fall and, under Kansas case law, is compensable. The decision of the ALJ denying respondent's motion to terminate claimant's ongoing medical benefits is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

This record fails to establish the cause of claimant's fall on September 2, 2008, while claimant was exiting an elevator and walking down respondent's hall. As such, the fall is unexplained and, under Kansas law, compensable.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Hearing Order of Administrative Law Judge Bruce E. Moore dated February 2, 2009, should be, and is hereby, affirmed.

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[6] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

[7] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of April, 2009.

HONORABLE GARY M. KORTE

c: Matthew L. Bretz, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carriers
Bruce E. Moore, Administrative Law Judge